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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 UNITED STATES OF AMERICA,

4 v.

19 Cr. 714 (VM) (SDA)

5 DOV MALNIK,

6 Defendant.

Plea

7 -----x

8 New York, N.Y.

9 June 25, 2021

11:30 a.m.

10 Before:

11 HON. STEWARD D. AARON,

12 U.S. Magistrate Judge

13 APPEARANCES

14 AUDREY STRAUSS

15 United States Attorney for the

Southern District of New York

16 BY: DANIEL M. TRACER

Assistant United States Attorney

17 RANDALL JACKSON

18 Attorney for Defendant

19 ALSO PRESENT:

20 Matthew Mahaffey, FBI

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(Case called)

THE DEPUTY CLERK: Counsel, please state your appearances for the record.

MR. TRACER: Daniel Tracer, for the government. I'm joined by Special Agent Matt Mahaffey with the FBI.

Good morning, your Honor.

THE COURT: Good morning.

MR. JACKSON: Good morning, your Honor. Randall Jackson, on behalf of the defendant, Mr. Malnik.

THE COURT: Good morning.

We are here this morning in connection with a guilty plea that Mr. Malnik wants to enter.

Am I correct?

MR. JACKSON: Yes, your Honor.

THE COURT: All right. I have before me a document entitled Consent to Proceed Before a United States Magistrate Judge On a Felony Plea Allocution.

And, Mr. Malnik, am I correct that you signed this document?

THE DEFENDANT: Yes, your Honor.

THE COURT: All right. The form says that you know you have the right to have your plea taken by a United States district judge, but you are agreeing to have your plea taken by a United States magistrate judge. As a magistrate judge I have the authority to take your plea with your consent, and you'll

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1 still be entitled to all the same rights and protections as if
2 you were before a district judge. Among other things, if you
3 are found guilty you will be sentenced by a district judge.

4 Did you sign this form voluntarily?

5 THE DEFENDANT: Yes, your Honor.

6 THE COURT: And did Mr. Jackson explain it to you
7 before you signed it?

8 THE DEFENDANT: Yes, your Honor.

9 THE COURT: And do you wish to proceed to have your
10 plea taken before me, a United States magistrate judge?

11 THE DEFENDANT: Yes, your Honor.

12 THE COURT: So I am accepting your consent.

13 Thank you. Please be seated.

14 THE DEFENDANT: Thank you. I will now ask my deputy
15 to please swear Mr. Malnik.

16 (Defendant sworn)

17 THE COURT: Mr. Malnik, the purpose of this proceeding
18 is to make sure that you understand your rights, to decide
19 whether you're pleading guilty of your own free will, and to
20 make sure you are pleading guilty because you are in fact
21 guilty and not for some other reason.

22 Do you understand?

23 THE DEFENDANT: Yes, I do, your Honor.

24 THE COURT: I am now going to ask you certain
25 questions. It is very important that you answer these

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1 questions honestly and completely. If you don't understand any
2 questions or if you want any time to consult with your counsel,
3 please let me know, because it's important that you understand
4 every question before you answer. Okay?

5 THE DEFENDANT: Yes, your Honor.

6 THE COURT: And what is your full name?

7 THE DEFENDANT: Dove Malnik.

8 THE COURT: And how old are you?

9 THE DEFENDANT: I'm 43 years old.

10 THE COURT: And can you read and write in the English
11 language?

12 THE DEFENDANT: Yes, I do, your Honor.

13 THE COURT: What is the highest grade in school that
14 you completed?

15 THE DEFENDANT: I'm completed university degree,
16 bachelor's degree in the U.S.

17 THE COURT: And are you currently or have you recently
18 been under the care of a doctor or a mental health professional
19 for any reason?

20 THE DEFENDANT: No, your Honor.

21 THE COURT: And are you under the influence of any
22 drug or alcohol today?

23 THE DEFENDANT: No, your Honor.

24 THE COURT: How are you feeling physically today?

25 THE DEFENDANT: I'm feeling fine, your Honor.

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1 THE COURT: Have you had sufficient time to discuss
2 the charges against you and your plea with your attorney?

3 THE DEFENDANT: Yes, your Honor.

4 THE COURT: And have you been satisfied with the
5 advice and counsel that your attorney has provided to you?

6 THE DEFENDANT: Yes, your Honor.

7 THE COURT: And are you ready to enter a plea today?

8 THE DEFENDANT: Yes, your Honor.

9 THE COURT: Does either counsel have any objection
10 with respect to Mr. Malnik's competence to plead at this time?

11 MR. TRACER: Not from the government.

12 MR. JACKSON: No, your Honor.

13 THE COURT: All right. Now, in order to determine,
14 Mr. Malnik, whether your plea is voluntary and made with a full
15 understanding of the charges against you and the consequences
16 of your plea, I am going to be making certain statements to
17 you. I am also going to be asking you certain questions. I
18 want you to understand that I need not accept your plea unless
19 I am satisfied that you are in fact guilty and that you fully
20 understand your rights.

21 Now, the plea agreement states that you're pleading
22 guilty to Count Nine of the superseding indictment. Count Nine
23 charges you with securities fraud -- in violation of Title 15,
24 United States Code, Sections 78j(b) and 78ff; Title 17, Code of
25 Federal Regulations, Section 240.10b-5; and Title 18, United

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1 States Code, Section 2 -- and carries a maximum term of
2 imprisonment of 20 years, a maximum term of supervised release
3 of three years, a maximum fine pursuant to Title 15, United
4 States Code, Section 78ff of \$5 million, or, pursuant to Title
5 18, United States Code, Section 3571, twice the gross pecuniary
6 gain derived from the offense or twice the gross pecuniary loss
7 to persons other than yourself resulting from the offense.

8 Do you understand that this is the crime to which you
9 are pleading and the maximum and minimum penalties applicable
10 to that crime?

11 THE DEFENDANT: Yes, your Honor.

12 THE COURT: Now, supervised release means you will be
13 supervised for a period of years after your release from
14 prison. There will be conditions with which you must obey. If
15 you don't, you could be sent to prison without a jury trial.

16 Do you understand that?

17 THE DEFENDANT: Yes, your Honor.

18 THE COURT: I am also required to tell you there is a
19 special assessment, or a fine, of \$100 that is required to be
20 imposed.

21 Do you understand that as part of your plea agreement
22 you admit to the forfeiture allegation with respect to Count
23 Nine of the indictment?

24 THE DEFENDANT: Yes, your Honor.

25 THE COURT: And you have agreed to forfeit to the

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1 United States, pursuant to Title 18, United States Code,
2 Section 981(a)(1)(C) and Title 18, United States Code, Section
3 2461(c), a sum of money equal to \$1,594,779 in United States
4 currency representing proceeds traceable to the commission of
5 the offense. However, under the terms of the agreement, the
6 United States Attorney's Office will apply a credit against the
7 forfeiture amount for any payments that have been made in the
8 parallel SEC action.

9 Do you understand that?

10 THE DEFENDANT: Yes, your Honor.

11 THE COURT: In addition, you have consented to the
12 entry of a consent order of forfeiture document that is
13 attached to your plea agreement.

14 Do you understand that?

15 THE DEFENDANT: Yes, your Honor.

16 THE COURT: So, that consent order, a copy has been
17 provided to me. It obviously has not yet been so ordered or
18 approved by Judge Marrero. Assuming that I make a
19 recommendation to Judge Marrero to accept the plea, this order
20 will be forwarded to Judge Marrero for execution.

21 Am I right about that?

22 MR. TRACER: Yes, your Honor.

23 THE COURT: All right. You did sign that, Mr. Malnik?

24 THE DEFENDANT: Yes, your Honor, I did.

25 THE COURT: Do you agree to its terms?

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1 THE DEFENDANT: I do, your Honor.

2 THE COURT: All right. And do you also understand
3 that any forfeiture of your assets shall not be treated as
4 satisfaction of any fine, restitution, cost of imprisonment or
5 any other penalty the Court may impose upon you in addition to
6 forfeiture?

7 THE DEFENDANT: Yes, your Honor.

8 THE COURT: And you also have agreed to pay
9 restitution in an amount to be determined by the Court.

10 Do you understand that?

11 THE DEFENDANT: Yes, your Honor.

12 THE COURT: Mr. Malnik, what country are you a citizen
13 of?

14 THE DEFENDANT: Israel and Lithuania.

15 THE COURT: You should know that if you are not a
16 citizen of the United States, then your guilty plea and
17 conviction make it very likely that deportation from the United
18 States is presumptively mandatory and that at a minimum you are
19 at risk of being deported or suffering other adverse
20 immigration consequences.

21 Do you understand?

22 THE DEFENDANT: Yes, your Honor, I do.

23 THE COURT: Have you discussed the possible
24 immigration consequences of your guilty plea and conviction
25 with your lawyer?

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1 THE DEFENDANT: Yes, your Honor.

2 THE COURT: Am I correct that you want to plead guilty
3 regardless of any immigration consequences that may result from
4 your guilty plea and conviction, even if those consequences
5 were to include deportation from the United States?

6 THE DEFENDANT: Yes, your Honor.

7 THE COURT: If that does happen, you will still be
8 bound by your guilty plea, that is, you will not be able to
9 withdraw it regardless of any advice you've received from your
10 lawyer or others regarding the immigration consequences of your
11 plea.

12 Do you understand that?

13 THE DEFENDANT: Yes, your Honor.

14 THE COURT: Do you understand the charges against you
15 and the consequences of pleading guilty?

16 THE DEFENDANT: Yes, your Honor.

17 THE COURT: Now, in exchange for your plea, the United
18 States Attorney's Office has agreed not to criminally prosecute
19 you further for illegally engaging in transactions in the
20 securities of Omnicare Inc. in or about April and May 2015 on
21 the basis of material, nonpublic information that had been
22 misappropriated from the employer of an investment banker
23 identified as CC-2 in the superseding indictment as charged in
24 Count Nine of the superseding indictment and illegally engaging
25 in transactions in the securities of Avanar Pharmaceuticals,

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1 Inc., in or about November and December of 2014, Hyperion
2 Therapeutics, Inc., in or about March 2015 and Pharmacyclics,
3 Inc., in or about March 2015 on the basis of material,
4 nonpublic information that had been misappropriated from the
5 employer of the investment banker identified as CC-2 in the
6 superseding indictment as charged in Counts Five, Six, and
7 Seven of the superseding indictment.

8 Do you understand that?

9 THE DEFENDANT: Yes, your Honor.

10 THE COURT: Do you understand that the United States
11 Attorney cannot make any promises to you concerning criminal
12 tax violations?

13 THE DEFENDANT: Yes, your Honor.

14 THE COURT: Do you understand that in exchange for
15 your plea the plea agreement does not bar the use of your
16 conduct as a predicate act or as a basis for a sentencing
17 enhancement in a subsequent prosecution?

18 THE DEFENDANT: Yes, your Honor.

19 THE COURT: Do you agree that with respect to any and
20 all dismissed charge you are not a prevailing party within the
21 meaning of the Hyde Amendment and that you will not file any
22 claim under that law?

23 THE DEFENDANT: Yes, your Honor.

24 THE COURT: Do you understand you have the right to
25 plead not guilty and the right to a trial on the charges

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1 against you and, in fact, a trial by a jury?

2 THE DEFENDANT: Yes, your Honor.

3 THE COURT: All right. I am now going to ask the
4 assistant United States Attorney to state the elements of the
5 crimes charged. The elements are the things the government
6 would have to prove beyond a reasonable doubt if this case were
7 to go to trial.

8 MR. TRACER: Sure, your Honor.

9 Count Nine of the superseding indictment charges
10 securities fraud. In this case, it specifically involves what
11 we call tippee liability.

12 The elements that the government would have to prove
13 for securities fraud, and in particular for tippee liability,
14 are five things:

15 One, that there was an insider or tipper who was a
16 person to whom nonpublic confidential information had been
17 entrusted;

18 Two, that this tipper violated a relationship of trust
19 by disclosing that information;

20 Three, that the defendant, or the tippee, knew that
21 the tipper had violated a trust relationship;

22 Four, that the defendant, or the tippee, used that
23 information to trade in a security or tip another individual;
24 and

25 Five, that the scheme involved the use of interstate

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1 commerce, the mails, or national security exchanges.

2 In addition, the government would have to show that
3 the tipper or the insider personally benefited in some way from
4 the disclosure and that the tippee was aware of that benefit.

5 And I would just add that, as to personal benefit, the
6 government's burden would include showing that the disclosure
7 of inside information was made for some form of gain that did
8 not need to be financial or tangible in nature but could
9 include maintaining a network, improving a reputation, or
10 obtaining future financial benefits.

11 And, finally, the government would have to prove venue
12 in the Southern District of New York by a preponderance.

13 THE COURT: Mr. Malnik, do you understand that if you
14 pled not guilty and went to trial, the burden would be on the
15 government to prove each and every element of the crime charged
16 beyond a reasonable doubt in order to convict you?

17 THE DEFENDANT: Yes, I do, your Honor.

18 THE COURT: Do you understand that at trial you would
19 have the right to be represented by an attorney during all
20 stages of the proceedings, and, if necessary, an attorney would
21 be appointed for you?

22 THE DEFENDANT: Yes, your Honor.

23 THE COURT: Do you understand that at trial you would
24 have the right to confront and cross-examine witnesses against
25 you and the right not to be compelled to incriminate yourself?

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1 THE DEFENDANT: Yes, your Honor.

2 THE COURT: Do you understand that at trial you would
3 be presumed innocent until such time, if ever, the government
4 established your guilt by competent evidence to the
5 satisfaction of the trier of fact beyond a reasonable doubt?

6 THE DEFENDANT: Yes, your Honor.

7 THE COURT: Do you understand that at trial you would
8 have the right to testify and also be entitled to compulsory
9 process, in other words, the right to call other witnesses on
10 your own behalf?

11 THE DEFENDANT: Yes, your Honor.

12 THE COURT: Do you understand that if your plea is
13 accepted, there will be no further trial of any kind, so that
14 by pleading guilty you are waiving your right to trial?

15 THE DEFENDANT: Yes, your Honor.

16 THE COURT: Do you understand that any statements you
17 make here today under oath may be used against you in a
18 prosecution for perjury or for making false statements?

19 THE DEFENDANT: Yes, your Honor.

20 THE COURT: Failing to tell the truth today in this
21 proceeding is a crime.

22 Do you understand that?

23 THE DEFENDANT: Yes, your Honor.

24 THE COURT: All right. So I have been given a signed
25 copy of the plea agreement. And am I correct, Mr. Malnik, that

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1 you signed this agreement here this morning?

2 THE DEFENDANT: Yes, I did, your Honor.

3 THE COURT: And did you read the plea agreement before
4 you signed it?

5 THE DEFENDANT: Yes, I did, your Honor.

6 THE COURT: And did you discuss this agreement with
7 your lawyer, Mr. Jackson, before you signed it?

8 THE DEFENDANT: Yes, your Honor.

9 THE COURT: Putting the plea agreement to one side,
10 separate and apart from what is in the agreement, have any
11 threats or promises been made to you to make you plead guilty?

12 THE DEFENDANT: No, your Honor.

13 THE COURT: Is anyone forcing to you plead guilty?

14 THE DEFENDANT: No, your Honor.

15 THE COURT: Again, putting the plea agreement to one
16 side, have any understandings or promises been made to you
17 concerning the sentence that you will receive?

18 THE DEFENDANT: No, your Honor.

19 THE COURT: Is your plea voluntary, in other words,
20 being made of your own free will?

21 THE DEFENDANT: Yes, your Honor.

22 THE COURT: Now, I am going to review certain portions
23 of the plea agreement with you. It states that you and the
24 government have reached agreement regarding the appropriate
25 calculation of your sentence under the part of our law known as

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1 the sentencing guidelines and that the stipulated guidelines
2 range is from 37 to 46 months.

3 Do you understand that?

4 THE DEFENDANT: Yes, your Honor.

5 THE COURT: And the agreement also states that you and
6 the government have agreed that the applicable fine range is
7 \$7,500 to \$5 million.

8 Do you understand that?

9 THE DEFENDANT: Yes, your Honor.

10 THE COURT: Do you understand that neither the
11 probation office nor the Court is bound by the guideline
12 stipulations and that the sentence to be imposed upon you is
13 determined solely by the Court?

14 THE DEFENDANT: Yes, your Honor.

15 THE COURT: Now, in imposing its sentence upon you,
16 the Court is obligated to calculate the applicable sentencing
17 guideline range in determining a sentence range, including
18 other sentencing factors that are set forth in Title 18, United
19 States Code, Section 3553(a).

20 Do you understand that?

21 THE DEFENDANT: Yes, your Honor.

22 THE COURT: Do you understand you have agreed not to
23 file a direct appeal or otherwise challenge your conviction or
24 sentence if you are sentenced within or below the stipulated
25 guidelines range?

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1 THE DEFENDANT: Yes, your Honor.

2 THE COURT: And do you understand you have agreed to
3 waive your right to appeal any term of supervised release that
4 is less than or equal to the statutory maximum?

5 THE DEFENDANT: Yes, your Honor.

6 THE COURT: And do you understand you have also agreed
7 to waive your right to appeal any fine that is less than or
8 equal to \$5 million?

9 THE DEFENDANT: Yes, your Honor.

10 THE COURT: Now, in light of the foregoing, how do you
11 plead?

12 THE DEFENDANT: I plead guilty, your Honor.

13 THE COURT: And are you pleading guilty because you
14 are in fact guilty?

15 THE DEFENDANT: Yes, your Honor.

16 THE COURT: Do you understand that the plea agreement
17 does not bind any prosecuting office other than the United
18 States Attorney's Office for the Southern District of New York?

19 THE DEFENDANT: Yes, your Honor.

20 THE COURT: Do you understand that, apart from any
21 proffer agreements that you may have entered into with the
22 government, the plea agreement takes the place of any prior
23 understanding you may have had with the government and that the
24 plea agreement cannot be modified except in a writing signed by
25 all parties?

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1 THE DEFENDANT: Yes, your Honor.

2 THE COURT: Do you understand that if your conviction
3 following your plea of guilty is vacated for any reason, then
4 the government is not time barred, and that if the cause of
5 action was not time barred as of the date you signed the
6 agreement, the government could reinstate its prosecution
7 against you?

8 THE DEFENDANT: Yes, your Honor.

9 THE COURT: Mr. Malnik, did you commit the offense to
10 which you are pleading?

11 THE DEFENDANT: Yes, your Honor.

12 THE COURT: Please tell me in your own words what you
13 did.

14 THE DEFENDANT: During the summer of 2015, I purchased
15 stock in a company called Omnicare, which was traded in the New
16 York Stock Exchange after receiving information from another
17 person. I understood that this was important confidential
18 information. I also understood that this information was
19 originated from somebody who violated a duty to keep that
20 information confidential. I provided something of value to
21 that person who provided me the information, and I understood
22 the person who violated a duty of trust and confidence also
23 received something in return. I used this information to
24 purchase stock in Omnicare, and I made a profit.

25 I understand my actions were wrong, and I am deeply

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1 sorry for that. I will forever regret my conduct and the
2 profound impact that it had on my family and my friends. I
3 also want to sincerely apologize more broadly to every person
4 impacted by my actions.

5 Thank you, your Honor.

6 THE COURT: The acts that you just mentioned, at the
7 time that you did that, did you know what you were doing was
8 wrong and against the law?

9 THE DEFENDANT: I did, your Honor.

10 THE COURT: Let me ask the government, does the
11 government have any additional questions it would like me to
12 put to Mr. Malnik?

13 MR. TRACER: I don't. I think that's sufficient, your
14 Honor.

15 THE COURT: All right. Now, let me ask the
16 government, assuming that Mr. Malnik were not pleading guilty,
17 what evidence would the government proffer at trial as to his
18 guilt?

19 MR. TRACER: Sure, your Honor.

20 If the case were to proceed to trial, the government
21 would prove the guilt of the defendant beyond a reasonable
22 doubt through the use of both documentary records and witness
23 testimony. In particular, documentary records would include
24 trading records that relate to the defendant's trading in the
25 subject securities as well as financial records that show

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1 relevant movements of money back and forth between parties in
2 this case, as well as documentary evidence that would show
3 access by insiders who obtained confidential information from
4 their investment bank employers. In addition, the government
5 would rely on the testimony of witnesses, including at least
6 one, maybe more, cooperating witnesses who were involved in the
7 scheme with the defendant.

8 THE COURT: Mr. Malnik, in light of all the foregoing,
9 do you still wish to plead guilty?

10 THE DEFENDANT: Yes, your Honor.

11 THE COURT: Mr. Jackson, you do you know of any reason
12 why Mr. Malnik ought not to plead guilty?

13 MR. JACKSON: No, your Honor.

14 Your Honor, may I offer one clarification Mr. Malnik
15 wanted to make from earlier?

16 THE COURT: Of course.

17 MR. JACKSON: Mr. Malnik prior to being extradited was
18 being treated by the staff of the facility where he was
19 detained. I think he understood your question to relate to
20 anything having to do with his competency. There's no need to
21 elaborate on the record, but that treatment has nothing to do
22 with Mr. Malnik's competency to plead guilty and he has no
23 questions and we have no questions about his competency. I
24 just wanted to clarify that.

25 THE COURT: Okay. Does the government have anything

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1 it wishes me to follow up on with respect to that statement?

2 MR. TRACER: No, your Honor.

3 THE COURT: Okay. So the Court is satisfied,
4 Mr. Malnik, that you understand the nature of the charges
5 against you and the consequences of your plea. The Court also
6 is satisfied that your plea is being made voluntarily and
7 knowingly and that there's a factual basis for it.
8 Accordingly, I will recommend to District Judge Marrero that
9 your plea of guilty be accepted. I assume the government will
10 order a copy of the transcript and will submit it together with
11 any additional paperwork so that Judge Marrero may act on my
12 recommendation.

13 MR. TRACER: Yes, your Honor.

14 THE COURT: Will you also deliver the case summary for
15 purposes of the presentence report to the probation department
16 within 14 days?

17 MR. TRACER: Yes.

18 THE COURT: And let me ask Mr. Jackson, will you be
19 available to be interviewed by the probation department with
20 your client within 14 days?

21 MR. JACKSON: Yes, your Honor.

22 THE COURT: Has Judge Marrero set a control date for
23 the sentencing?

24 MR. TRACER: We have not, your Honor, and we would ask
25 that your Honor set one first, and then we will follow up with

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1 chambers of Judge Marrero.

2 THE COURT: Okay. So I'm going to set a control date
3 of October the 25th, 2021, but that is merely a control date
4 and obviously Judge Marrero controls his own calendar so
5 counsel is directed to contact Judge Marrero for that purpose.

6 All right. Is there anything else from either side?

7 MR. TRACER: Not from the government.

8 MR. JACKSON: Nothing from the defense.

9 Thank you, your Honor.

10 THE COURT: All right. Thank you.

11 This matter is adjourned.

12 (Adjourned)